SUPREME COURT, U.S.
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SUPREME COURT OF THE UNITED STATES

November Term, 1978

No. 78-799

BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP, et al.,

Petitioners,

v.

HERBERT BARNESS, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED

The provisions of 28 U.S.C. §2101(c) require that a petition for writ of certiorari be filed within ninety days after the entry of the judgment or decree sought to be reviewed. The docket of the Supreme Court of Pennsylvania made in connection with this case discloses that the Order of that Court denying a Petition for Allowance of Appeal filed by the Board of Supervisors of Buckingham Township was entered July 3, 1978 (Appendix to Petition for Writ of Certiorari, pages 33-36). The Petition for Writ of Certiorari in this case was filed with the Clerk of this Court on November 14, 1978, 126 days subsequent to the entry of the Order of the Supreme Court of Pennsylvania. Thus, the filing of the Petition for Writ of Certiorari was not timely.

Counsel for Petitioner apparently

takes the position that the ninety-day period permitted by statute for the filing of a petition for writ of certiorari did not begin to run until August 16, 1978, on which date the Prothonotary of the Supreme Court of Pennsylvania notified the parties to this litigation of the entry of the Order dated July 3, 1978. However, there is no precedent for the proposition that the date of notice to counsel of the entry of an order is the operative date for purposes of computation of the time within which a petition for writ of certiorari must be filed.

If counsel for Petitioner anticipated difficulty in filing a timely petition for writ of certiorari as a result of the delay in receiving notice of the entry of the Order of July 3, 1978, counsel could have availed himself of the provisions of Supreme Court Rule 22.4 permitting the filing of an application for extension of time within

which to file his Petition. No such application was filed.

For the preceding reasons, the Petition of the Board of Supervisors of Buckingham Township for Writ of Certiorari should be denied as untimely.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SPECIAL OR IMPORTANT REASON EXISTS FOR GRANTING SUCH WRIT

A. THE QUESTION OF STANDING

Petitioner contends that the respondents in this litigation, all of whom are landowners in Buckingham Township, did not have standing to challenge the Constitutionality of the Buckingham Township Zoning Ordinance. Petitioner cites Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197 (1975) as precedent for this contention. It is respectfully submitted that Petitioner's argument in this regard is without merit.

Petitioner suggests that in challenging the constitutionality of the Buckingham Township Zoning Ordinance the respondent property owners were seeking to assert the

rights of unnamed third persons. This is not the case. To the contrary, the challenges to the validity of the zoning ordinance were based upon the fact that the ordinance excluded from the entire township any new residential development other than the construction of single family dwelling houses. (See Opinion of the Commonwealth Court of Pennsylvania, Appendix to Petition for Writ of Ceriorari, page 19). For this reason, Warth v. Seldin, is inapposite.

Petitioner's argument concerning standing must further fail because standing to raise a substantive challenge to the constitutionality of the Buckingham Township Zoning Ordinance is conferred upon respondent landowners by Section 609.1 of the Pennsylvania Municipalities Planning Code, effective June 1, 1972, P.L. 333, No. 93, Section 10, 53 P.S. Section 10609.1 That statute provides, inter alia:

> A landowner who desires to challenge on substantive grounds the validity of an ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 1004.

Each of the challenges to the validity of the Buckingham Township Zoning Ordinance was filed by a landowner. Thus standing was expressly conferred upon respondents by the statute set forth above.

B. THE CONSTITUTIONAL QUESTION

Petitioner contends that the Pennsylvania Courts in analyzing the challenges to the constitutionality of the Buckingham Township Zoning Ordinance have erroneously applied the Fifth and Fourteenth Amendments to the United States Constitution in concluding that the zoning ordinance in question was unconstitutional because it did not provide for townhouses, apartments, and mobile homes. Petitioner argues that when a challenge to the constitutionality of a

zoning ordinance is made the issue is whether the property of the challenger has been taken without just compensation. This argument evidences a fundamental misunderstanding of the issue decided by the Pennsylvania courts in this litigation as well as a misunderstanding of previous decisions of this Court.

In Nectow v. City of Cambridge, 277 U.S. 183, 48 S. Ct. 447 (1928), this Court clearly articulated the standard of review to be applied where a zoning ordinance was alleged to be unconstitutional. This Court stated:

> The governmental power to interfere by zoning regulations with the general right of the land owner by restricting the character of his use, is not unlimimted, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.
> 277 U.S. 183, 188.

In analyzing constitutional challenges to zoning ordinances the Pennsylvania Supreme Court and the Pennsylvania Commonwealth Court have in each case analyzed the

zoning ordinance in question to determine whether the ordinance bears a substantial relationship to the health, safety, morals or general welfare of the community. The Pennsylvania courts have further recognized that each zoning case involves a different set of facts and circumstances in light of which the constitutionality of the zoning ordinance must be tested. National Land and Investment Co. v. Easttown Township, 419 Pa. 504, 215 A.2d 597 (1965); Exton Quarries Inc. v. Zoning Board of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967); Girsh Appeal 437 Pa. 237, 263 A.2d (1970); Surrick v. Zoning Board for the Township of Upper Providence, 476 Pa. 182, 382 A.2d 105 (1977); East Pikeland Township v. Bush Brothers, Inc., 13 Pa. Commonwealth Ct. 578, 319 A.2d 7 (1974); CampHill Development Co., Inc, v. Zoning Board of Dauphin, 13 Pa. Commonwealth Ct. 519, 319 A.2d 197 (1974).

The opinion of the Commonwealth Court in this case affirming the decision of

Court of Common Pleas of Bucks County holding to the Buckingham Township Zoning Ordinance to be unconstitutional indicates that that Court properly determined that the zoning ordinance in question is unconstitutional because no provision is made for apartments, townhouses, or mobile homes, all of which Pennsylvania courts have found to be legitimate residential uses, and because this exclusion bears no substantial relationship to health, safety, morals or the general welfare of the community. (See Opinion of Commonwealth Court, Appendix to Petition for Writ of Certiorari, page 19 et. seq.). The finding is supported by the record and there is no compelling reason why this Court should review that conclusion.

C. THE QUESTION OF JUDICIAL RELIEF

Buckingham Township urges this Court to grant its Petition for Writ of Certiorari because it is dissatisfied with the relief afforded to the successful challengers to the Buckingham Township Zoning Ordinance by the Pennsylvania Court. However, the question

of the relief to be granted to the challengers is purely a matter of state law and should not be reviewed by this Court.

Section 1011(2) of the Pennsylvania Municipalities Planning Code, Act of June 1, 1972, P.L. 333, No. 93, Section 19, 53 P.S. Section 11011(2), provides inter alia:

> (2) If the court finds that . . . a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials . . . it may order the described development or use approved as to all elements or it may order it approved as to some elements and refer other elements to the governing body . . . for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order.

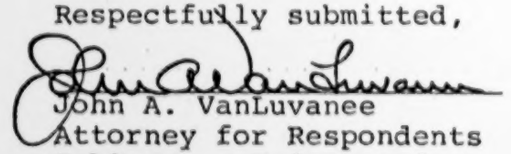
The Opinion and Order of the Court of Common Pleas of Bucks County, affirmed by the Pennsylvania Commonwealth Court, was within the guidelines of the statutes set forth above. The Commonwealth Court in its Opinion found that under the circumstances of this case the granting of relief to the successful challengers was necessary and appropriate. (See Opinion of Commonwealth Court, Appendix to

Petition for Writ of Certiorari, page 19 et. seq.). The determination by Pennslyvania Courts of the appropriate judicial relief authorized pursuant to Pennsylvania statute does not raise a federal question which may be reviewed by this Court.

CONCLUSION

Respondents, Claude J. Schlanger; John F. Enders, Jr., and Della E. Enders, his wife; and John F. Enders, Jr., Della E. Enders, his wife and William J. Shedden, Jr. respectfully request this Court to deny the Petition for Writ of Certiorari filed by the Board of Supervisors of Buckingham Township.

Respectfully submitted,



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